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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 659

THE CHOCTAW NATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The Choctaw Nation prays that a Writ of Certiorari issue to review the judgment of the Court of Claims entered in the above case on April 1, 1940.

Opinion Below.

The opinion of the Court of Claims has not been officially reported but is incorporated in the transcript (R. 30-107).

Jurisdiction.

The judgment of the Court of Claims was entered on April 1, 1940. Motion for New Trial was filed on May 31, 1940, and was overruled on October 7, 1940 (R. 108). The

jurisdiction of the Court is invoked under the Act of June 7, 1924, 43 Stat. 537, and a joint resolution of May 17, 1926, 44 Stat. 568.

Statutes Involved.

June 7, 1924, 43 Stat. 537.
Resolution, May 17, 1926, 44 Stat. 567.
Curtis Act, 30 Stat. 50.
Rev. Statutes, Sec. 2097.
August 12, 1935, 49 Stat. 571.
April 26, 1906, 34 Stat. 137.
June 25, 1910, 36 Stat. 774.
April 1, 1880, 21 Stat. 70.
March 3, 1899, 30 Stat. 1074.
March 7, 1928, 45 Stat. 200.
March 1, 1907, 34 Stat. 1027.

Treaties Involved.

TREATY OF OCTOBER 18, 1820

7 Stat. 210.

Article 6 reads as follows:

> "The Commissioners of the United States further covenant and agree on the part of the United States that an agent shall be appointed in due time for the benefit of the Choctaw Indians who may be permanently settled in the country ceded to them beyond the Mississippi River."

TREATY OF 1825

7 Stat. 234.

Article 9 reads as follows:

> "* * * An agent shall be appointed for the Choctaws west of the Mississippi."

TREATY OF 1830

7 Stat. 333.

Article 12 reads as follows:

"All intruders shall be removed from the Choctaw Nation and kept without it. * * *"

Article 13 reads as follows:

"It is consented that a qualified Agent shall be appointed for the Choctaws every four years, unless sooner removed by the President; and he shall be removed on petition of the constituted authorities of the Nation, the President being satisfied there is sufficient cause shown. The Agent shall fix his residence convenient to the great body of the people; and in the selection of an Agent immediately after the ratification of this Treaty, the wishes of the Choctaw Nation on the subject shall be entitled to great respect."

TREATY OF 1855

11 Stat. 611.

Article 20 reads as follows:

"* * * and in order that their relations to each other and the United States may hereafter be considered in a harmonious and satisfactory manner, there shall be one agent for the two tribes."

TREATY OF 1866

14 Stat. 769.

Article 10 reads as follows:

"The United States re-affirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw Nations, entered into prior to the late rebellion, and in force at that time, not inconsistent herewith; and further agrees to

renew the payment of all annuities and others moneys accruing under such treaty stipulations and acts of legislation, from and after the close of the fiscal year ending on the thirtieth of June, in the year eighteen hundred and sixty-six."

TREATY OF APRIL 28, 1866.

14 Stat. 769.

Articles 3 and 46 read as follows:

Art. 3. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw nations respectively shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to, said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Chocktaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter,—less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before

referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper,—the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

Art. 46. Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, to be repaid out of said moneys or any other moneys of said nations in the hands of the United States; the residue, not affected by any provision of this treaty, to remain in the Treasury of the United States at an annual interest of not less than five per cent, no part of which shall be paid out as annuity, but shall be annually paid to the treasurer of said nations, respectively, to be regularly and judiciously applied, under the direction of their respective legislative councils, to the support of their government, the purposes of education, and such other objects as may be best calculated

to promote and advance the welfare and happiness of said nations and their people respectively.

ATOKA AGREEMENT.

30 Stat. 495.

Par. 5, p. 507, reads:

"That the United States shall put each allottee in possession of his allotment and remove all persons therefrom objectionable to the allottee."

Par. 8, p. 509, reads:

"That no charge or claim shall be made against the Choctaw or Chickasaw Tribes by the United States for the expenses of surveying and platting the lands and townsites, or for grading, appraising, and allotting the lands, or for appraising and disposing of the town lots as herein provided."

SUPPLEMENTAL TREATY OF SEPTEMBER 25, 1902.

32 Stat. 641.

Section 14 reads as follows:

"When allotments as herein provided have been made to all citizens and freedmen, the residue of lands not herein reserved or otherwise disposed of, if any there be, shall be sold at public auction under rules and regulations and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribes."

Questions Presented.

1. Whether, under the Atoka and Supplemental Agreements between the United States and the Choctaw and Chickasaw Nations of Indians, the United States was obli-

gated to pay the expenses incurred by the Commission to the Five Civilized Tribes in carrying out the program of allotting the lands in severalty and disposing of the residue of the tribal estate; also, whether, under prior treaties, the United States obligated itself to pay the expenses of miscellaneous agents and employees.

2. Whether the United States is liable to the Choctaw Nation of Indians for sums of money expended by the Secretary of the Interior from petitioner's tribal funds either in excess of or without Congressional authorization.

3. Whether, as a part of just compensation, the Choctaw Nation of Indians is entitled to recover from the United States interest on a judgment against the United States from the date of the entry of said judgment until Congress made an appropriation in satisfaction thereof.

4. Whether the payment by the Secretary of the Interior of Choctaw tribal funds to the Choctaw National Treasurer is prohibited by Section 19 of the Curtis Act, 30 Stat. 502.

5. Whether the Secretary of the Interior was authorized to pay out of Choctaw tribal funds certain warrants issued by Choctaw tribal officials.

6. Whether various Acts of Congress, under which the Secretary of the Interior disbursed the principal of four interest-bearing trust funds of the Choctaw Nation, were sufficiently specific to authorize such disbursements, in view of the provisions of Rev. Stat. Sec. 2097.

7. Whether the just compensation to be awarded a tribe of Indians, under the Act of June 7, 1924, as amended, for the wrongful disbursement of its tribal funds by the United States, should be confined to the principal amount at the time of the taking, or should include such addition thereto as may be required to produce the present equivalent of that value as by the addition of interest.

8. Whether there is any balance due the Choctaw Tribe of Indians under Article 3 of the Treaty of 1866 for the cession of lands known as "Leased District."

9. (a) Whether tribal funds expended by the United States are gratuities within the meaning of the Act of August 12, 1935, 49 Stat. 571.

(b) Whether expenditures made by the United States for the benefit of the Choctaw Tribe of Indians were made gratuitously or pursuant to treaty or other contractual obligations.

(c) Whether the Act of Congress of August 12, 1935, authorizing the offsetting of gratuities against any judgment that might be obtained by a Tribe of Indians, has any application to pending cases.

Statement.

This case was brought by the Choctaw Nation against the United States to recover judgment for approximately $4,188,913.32, which includes interest of $1,703,107.20 from various dates to June 30, 1935, on $1,121,253.29, of the items making up the total of the principal amount claimed. Interest is also claimed to date of judgment. Recovery is sought for sums alleged to be due petitioner under treaties with the United States, and to recover other sums alleged to have been illegally disbursed from petitioner's funds in violation of stipulations of Articles 3, 13 and 46, Treaty of April 28, 1866, 14 Stat. 769, The Atoka Agreement of April 23, 1897, 30 Stat. 495, and the Supplemental Agreement of July 1, 1902 (Supplemental Treaty), 32 Stat. 641, as well as the violation of certain Acts of Congress by the Secretary of the Interior in illegally disbursing funds of the petitioner, and to recover other funds being either in excess of or without Congressional authorization.

The Court of Claims found substantially the facts as claimed by petitioner, which may be summarized as follows:

1. The respondent expended from the Petitioner's funds in the carrying out of the provisions of the Atoka and Supplemental Agreements, the sum of $789,773.17. Findings 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20 and 21. (Items R. 71.)

2. The Secretary of the Interior made disbursements for school purposes from petitioner's tribal moneys from July 1, 1914, to June 30, 1929, inclusive, in excess of the amounts of $125,166.87 and $135,000.00, authorized by the Acts of April 26, 1906 and March 7, 1928, 34 Stat. 137 and 45 Stat. 200, respectively, in the total amount of $119,294.25. (Finding No. 4, R. 34-37.)

3. Petitioner claimed principal in the sum of $10,546.69 and interest in the sum of $147,491.36 as part of just compensation for lands allotted to Chickasaw Freedmen under the decree of the Court of Claims entered on April 27, 1903. (Finding No. 22, R. 43-44.)

4. The Secretary of the Interior made payments totalling the sum of $419,580.89 to the Choctaw National Treasurer subsequent to the Curtis Act, 30 Stat. 502, which petitioner claims are in violation of said Act. (Finding No. 23, R. 44-46.)

5. In the years 1900 to 1904, the Secretary of the Interior disbursed from petitioner's non-interest bearing funds, a total of $46,866.45 for the payment of certain Choctaw warrants issued by the Choctaw National Government. (Finding No. 24, R. 46.)

6. The Secretary of the Interior disbursed the principal of $978,787.31 of the four interest-bearing trust funds of the petitioner, as follows:

(a) Choctaw school fund	$49,472.70
(b) Choctaw orphan fund	39,710.69

(c) Choctaw general fund..... 499,346.00
(d) Choctaw three percent fund..... 390,257.92

(Finding No. 25, R. 46-51, inclusive.)

7. Of the $500,000.00 five per cent trust fund, created under the provisions of Article 13 of the Treaty dated June 22, 1855, 11 Stat. 611, for the benefit of the Choctaw Nation, the residue of said trust funds amounting to $390,257.92, effective January 1, 1908, was continued and reduced to a three per cent trust fund by the Act of March 1, 1907, 34 Stat. 1027, and the loss to petitioner by reason of the change of interest from five per cent to three per cent, amounted to $63,423.11. (Finding No. 26, R. 51.)

8. The interest on the $978,787.31 disbursement from the dates of disbursements to June 30, 1935, is $1,233,907.40. (Finding No. 27, R. 51.)

9. Petitioner claims principal in the sum of $79,082.87, and interest amounting to $207,059.31, under Article 3, Treaty of 1866, on petitioner's $225,000.00 of the $300,000.00 agreed to be paid for the cession to the United States of lands known as the "Leased District". Payments were made by respondent to petitioner on this account as follows:

"

Fiscal year		
1867	Cash payment to Choctaw Treasurer under Art. 46, Treaty of 1866....	$150,000.00
1868	Cash payment to Choctaw Treasurer	11,250.00
1870	Cash payment to Choctaw Treasurer	11,250.00
1883	Expended pursuant to Act of May 7, 1882 (22 Stat. 73), for education of freedmen	7,500.00
1886	Placed in General Trust Fund of Choctaw Nation pursuant to Act of March 3, 1885 (23 Stat. 362, 366)..	52,125.00
	Total	$231,125.00"

(R. 32.)

10. The defendant made expenditures for the benefit of petitioner for the period 1806 to 1934, inclusive, of a total of $3,574,439.65. (Findings 28-40, inclusive.) (An examination of the items constituting these disbursements discloses that said disbursements, with the exception of items not exceeding $500,000.00, in the aggregate, were expended by the respondent for administrative expenses of the Commission to the Five Civilized Tribes, which petitioner contends the respondent was obligated to pay under the Atoka, Supplemental and earlier treaties; and that said amounts could not constitute proper offsets to petitioner's claims.)

Conclusions of Law.

Upon the specific findings of fact above summarized, the Court of Claims decided as a conclusion of law that petitioner was entitled to recover $63,423.11 and that the respondent, on its counterclaim, was entitled to an offset against the claim of petitioner, of gratuities amounting to $3,574,439.65.

The court also denied the claim of petitioner for the principal sum of $79,082.87 and interest of $207,059.35, claimed under Article 3 of the Treaty of 1866, on the ground that the account had been settled by an Act of Congress.

Specification of Errors to be Urged.

The Court of Claims erred:

1. In holding that the respondent was not required by the Atoka and Supplemental agreements and other treaties to bear certain administrative expenses in dividing the Choctaw tribal lands in severalty and in disposing of tribal property and distributing the tribal estate.

2. In holding that petitioner was not entitled to recover from the respondent tribal funds disbursed by the Secre-

tary of the Interior either in excess of or without congressional authorization.

3. In holding that the Choctaw Nation of Indians was not entitled to recover from the United States interest on a judgment against the United States from the date of the entry of said judgment until Congress made appropriation in satisfaction thereof.

4. In holding that the Secretary of the Interior was not prohibited by Section 19 of the Curtis Act, 30 Stat. 502, from the payment of tribal funds to the Choctaw National Treasurer.

5. In holding that the Secretary of the Interior was authorized by certain acts of Congress to deplete and disburse four interest bearing trust funds of the Choctaw tribe of Indians, notwithstanding the provisions of the Rev. Stat. Sec. 2097.

6. In holding that the Choctaw tribe of Indians was not entitled, under the Act of June 7, 1924, as amended, to recover in addition to the principal amount of tribal funds wrongfully disbursed, an additional amount equivalent to interest on the principal sum from the time of taking.

7. In holding that there was no balance due petitioner for the purchase price by respondent of the "Leased District" under Section 3 of the Treaty of 1866.

8. (a) In holding that the tribal funds were gratuities within the meaning of the Act of August 12, 1935.

(b) In holding that certain of the expenditures made by the United States were not made pursuant to treaty obligations, but were made gratuitously.

(c) In holding that the Act of Congress of August 12, 1935, authorizing the offsetting of gratuities against any

judgment that might be obtained by a tribe of Indians applies to pending cases.

Reasons for Granting the Writ.

I.

The Court of Claims was in error in holding that administrative expenses, incurred by the Commission to the Five Civilized Tribes in the sum of $789,773.17 and paid from petitioner's funds, were not direct or incidental treaty obligations imposed upon the respondent either under the Atoka or Supplemental Agreements or under some of the earlier agreements wherein the respondent was obligated to maintain agents and other Government employees in the Choctaw Nation for the purpose of protecting the interests of the Tribe.

Under the terms of the Atoka Agreement, 30 Stat. 495, all lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians were to be allotted in severalty to the members of the Tribes so that each member would receive a fair and equal share thereof, and all lands set apart for townsite purposes were to be sold and the proceeds derived therefrom, paid to the members of the Tribes by a bonded officer of the United States. After thus providing in general for the final disposition of all of the common domain and properties of the Choctaw and Chickasaw Tribes, this treaty contained the following important stipulation:

> "That no charge or claim shall be made against the Choctaw and Chickasaw Tribes by the United States for the expense of surveying and platting the land and town sites or for grading, appraising and allotting the lands, or for appraising and disposing of the town lots as herein provided."

Here, the Government assumed broad and far-reaching obligations. They could well be held to embrace the expense

of every activity in appraising and allotting the lands and in disposing of the town lots and other properties, and all other expenses in the administration of the tribal estate, and in the distribution per capita of all revenue arising out of the estate.

A Supplemental Agreement was entered into in 1902, Act of July 1st, 1902, ratified as a treaty September 25, 1902, 32 Stat. 641. These two agreements, as stated by the Court of Claims, were "designed to effect and carry out the many purposes intended to be accomplished, among which were the following: Surveying, platting, grading, and appraising lands for allotment, allotting lands to individual Indians of the Tribe; surveying, platting, appraising, and disposing of town sites and town lots; settling of all controversies between members of the Tribe as to their right to have certain lands allotted to them; the placing of each allottee in possession of his allotment, and the removal of all persons therefrom objectionable to the allottee," and all other things necessary to wind up the tribal affairs and to fit the Indian allottees for citizenship in the New State expected to be erected. This Supplemental Treaty is, as its name imports, supplementary to the original Atoka Agreement, made necessary to provide the details of the machinery by which to carry out the program of allotment in accordance with the intention of the parties. It in no sense displaced the original agreement, and the two treaties must be considered as one instrument. This is made plain by Sec. 68 of the Supplemental Agreement, which provides that "No Act of Congress or treaty provision, or any provision of the Atoka Agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw Nations." Therefore, all provisions of the Atoka Agreement remained in force except those inconsistent with the Supplemental Agreement, and there is nothing whatever in the Supplemental Agreement, inconsistent with the "no charge"

clause. This clause was in no sense modified, changed or abrogated.

Choate v. *Trapp,* 224 U. S. 665;
Heckman v. *United States,* 224 U. S. 413.

As the Court of Claims states in its opinion, petitioner concedes that Congress, under its broad plenary power over the affairs, property and funds of the Indian Tribes, possesses the authority, insofar as the matter of administration only was concerned, to legally modify existing treaty provisions. But we just as firmly contend that under the decisions of this Court, Congress cannot repudiate solemn obligations assumed in treaties with Indians without rendering the Government liable for just compensation. This principle is clearly recognized in the recent case of *The Creek Nation* v. *United States,* 295 U. S. 103. It was there said:

> "But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such guardianship and to pertinent constitutional restrictions. *It did not enable the United States to give the tribal lands to others,* or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.' *Lane* v. *Santa Rosa,* 249 U. S. 110, 113, 63 L. Ed. 504, 506, 39 S. Ct. 185; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 307, 308, 47 L. Ed. 183, 190, 23 S. Ct. 115."

Another provision of the Atoka Agreement (30 Stat. p. 507) provided "That the United States shall put each allottee in possession of his allotment and remove all persons therefrom objectionable to the allottee." This was a solemn undertaking by the United States, pursuant to which it was obligated to, and did, expend many thousands

of dollars. *Heckman* v. *United States, supra.* In this case, the Court said:

> "But in executing this policy, Congress was solicitous to conserve the interests of the Indians and to fulfill the national obligation, not simply by assuring an equitable apportionment of the property, but by safeguarding the individual ownership of allottees through suitable restrictions which were designed to secure them in their possession and to prevent their exploitation."

II.

The Court of Claims was in error in disallowing petitioner's claim for the $119,294.25 set forth in Finding No. 4.

This claim is for sums expended by the Secretary of the Interior from petitioner's funds for educational purposes, in certain years between 1913 and 1929, in excess of the amount specified in the Acts of April 26, 1906, 34 Stat. 137, and March 7, 1928, 45 Stat. 200, set forth in the findings. The Court of Claims held that petitioner was not entitled to judgment for this amount on the ground that the expenditure was for the benefit of petitioner and would have to be offset under the provisions of the Act of August 12, 1935, 49 Stat. 571.

We submit that there is nothing in this Act which justifies this conclusion. On the contrary, this Act, after directing the Court of Claims to consider and to offset against any amount found due the said Tribe, all sums expended gratuitously by the United States for the benefit of the said Tribe or band, further provides "that funds appropriated and expended from tribal funds shall not be construed as gratuitous." Clearly, this claim should have been allowed and the Court of Claims was not authorized to offset it.

III.

The Court of Claims erred in refusing to allow petitioner's claim for the sum of $10,546.69 principal, and for

the sum of $147,491.36 interest, not as interest as such, but as a part of just compensation, but which was not paid on a judgment against the respondent for $606,936.08 entered by the Court of Claims in the case of *The United States* v. *The Choctaw Nation, et al.*, 38 C. Cl. 558, affirmed 193 U. S. 115. Petitioner's claim here is that it was entitled to just compensation for lands allotted to Chickasaw freedmen and that such just compensation should have included an amount measured by interest at five per cent (5%) from the date of the decision of this Court on February 23, 1904, to the date of the appropriation by Congress, June 25, 1910, 36 Stat. 774, of moneys to pay the judgment. The judgment was for $606,936.08, and the payment of this amount did not constitute just compensation. See *United States* v. *Creek Nation*, 295 U. S. 103-111.

IV.

The Court of Claims erred in denying to petitioner recovery of $419,580.89 paid by the Secretary of the Interior to the Choctaw National Treasurer subsequent to and in violation of Section 19 of the Curtis Act, 30 Stat. 502. The section reads as follows:

> "That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

Prior to the passage of the Curtis Act all annuities to the Choctaw Nation by the United States were paid directly to the tribal treasurer in accordance with the stipulations con-

tained in the treaty of June 22, 1855, 11 Stat. 611, and the Act of April 1, 1880, 21 Stat. 70. The Court of Claims held in the case of the *Seminole Nation* v. *The United States*, 82 C. Cl. 135, that, due to the inefficiency and corruption in the tribal governments, the passage of the Curtis Act was deemed necessary to correct such conditions. By this provision the United States assumed administrative control of all Choctaw tribal funds, but in the very teeth of this statute, the Secretary of the Interior continued to make cash payments to the Choctaw National Treasurer during the years 1899 to 1906, inclusive, in the total sum of $419,580.89, as found by the Court of Claims in its Finding No. 23 (R. 44-46). It will be noted from the findings of fact by the Court of Claims that Congress in the annual appropriation bills appropriated out of the Treasury of the United States the sums it was obligated to pay the Choctaw Tribe under the treaties mentioned in the said findings. However, Congress never at any time appropriated the money out of the Tribal funds, but such payments were made by the Secretary of the Interior to the Choctaw National Treasurer without any congressional authorization to make such payments to him. For reasons heretofore stated, the holding of the Court of Claims that such payments were gratuitous and subject to offset is wholly untenable.

V.

We think the Court of Claims was in error in denying plaintiff's claim for the total sum of $46,866.45 in payment of Choctaw tribal warrants referred to in Finding No. 24.

VI.

The Court of Claims erred in refusing petitioner judgment for $978,787.31 of the four per cent (4%) interest bearing trust funds of petitioner, which were disbursed by

the Secretary of the Interior as specifically set forth in Finding No. 25 (R. 46-51, inclusive).

These disbursements were made in violation of and contrary to the provisions of Section 2097, Rev. Stat., which provides:

> "No funds belonging to any Indian Tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty or by express provision of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law." 25 U. S. C. A. Sect. 122.

These funds were paid out by the Secretary of the Interior pursuant to the Acts of Congress set forth in Finding No. 25, but it is petitioner's contention that the language used by Congress in these appropriations either was not intended to or was not legally sufficient as to comply with the said Section 2097 to constitute the "express provision of law" or to be "expressly authorized by law".

In the Act of March 3, 1899, 30 Stat. 1074-1099, Congress authorized the Secretary of the Interior to pay "From the funds in the Treasury belonging to the Choctaw Nation of Indians". Language of similar import was used in each appropriation bill, but in none of these acts was any specific reference made to any of these trust funds. The disbursements were, therefore, made in violation of law. See *Seminole Nation* v. *United States*, 82 C. Cl. 135. The ruling of the court in this case is in direct conflict with an opinion written by Mr. Willis Van Devanter, while assistant attorney general, afterwards a member of this Court. His opinion is quoted in the above styled case.

VII.

The Court of Claims allowed recovery in the sum of $63,423.11 in its Finding No. 26 (R. 51).

VIII.

In Finding No. 27 the Court of Claims states that if it should be held the various acts of Congress under which the four trust funds were distributed were not sufficiently specific to authorize such disbursement and that if they were not legally made and must be restored, that the interest on the $978,787.31 from dates of disbursements to June 30, 1935, was $1,233,907.40. If petitioner is correct in its claim that said principal sum was illegally disbursed, it is clearly entitled to an additional amount measured by interest as a part of just compensation for the taking of its property under the Fifth Amendment.

Claim for interest is hereby asserted on all of petitioner's funds which this Court may find have been unlawfully disbursed, and which petitioner is entitled to recover. *Creek Nation* v. *United States,* 295 U. S. 103-111, controls. In the *Creek* case the taking of land was involved. In this case it was the taking of money. Land is valued in money and we respectfully submit that the same rule would apply.

IX.

Article 3 of the Treaty of 1866.

This was plaintiff's first claim. Finding No. 1. We respectfully point out that the opinion of the court below overlooks the fundamental point that the lands here mentioned and known as the "Leased District" were ceded by the Nations to the Federal Government for no cash consideration other than the stipulated sum of $300,000.00, and this amount was never paid. As is disclosed by the court's opinion, the plaintiff contends that there was a balance due on the $300,000.00, and that the amount due, with interest at five per cent (5%), at the time the petition was filed, was $286,142.18. It is clear from the opinion that the court concluded that the defendant was not obligated to pay the bal-

ance alleged to be due, by reason of an alleged controversy that arose between the Choctaws and their Freedmen. The findings and opinion below do not question the figures submitted by plaintiff as a basis of recovery, but the court says:

> "This article contemplated the conditions which subsequently arose, namely, a contest between the Indians and their freedmen, and upon the basis of same the government under legislation settled it" (R. 70-71).

We submit that the conclusions of the court, in refusing to give the plaintiff a judgment for the unpaid balance on this claim, cannot be reconciled with the plain provisions of the Treaty of 1866, wherein the Government obligated itself to pay the $300,000.00 set forth in Article 3 of the Treaty of 1866. We think it is obvious, from the language of the opinion, that the court has reached an incorrect conclusion, and that by reason thereof, the case should be reviewed by this Court.

X.

Gratuities.

The Court of Claims committed serious error in holding that respondent was entitled to offset any claim that might be recovered by petitioner, in the total sum of $3,574,439.65, expended by the respondent, on the ground that said expenditures constituted gratuities under the Act of August 12, 1935, 49 Stat. 571. It will be noted that in its Finding No. 39, the Court of Claims sustains all expenditures made by respondent from 1897 to 1935, covering every type of expenditure made by respondent in enrolling and allotting the Indians and in the management and distribution of tribal properties of the Five Civilized Tribes, and apportions such expenses to petitioner on the basis of its membership to the entire membership of the Five Tribes. An

examination of the items in the schedules in the respective findings, and particularly of Finding No. 39, discloses that the expenditures were made in fulfilling the identical obligations that respondent assumed in the Treaties and for which it assumed all liability, and clearly the Court of Claims was in error in holding that said expenditures were gratuities, if made pursuant to treaty obligations as we think so conclusively appears from the very terms of the Treaties as we have hereinbefore shown. It is impossible, within the proper limits of this petition, to discuss in detail, or even in groups, all of these administrative expenditures made by respondent, but it is sufficient for our present purposes to repeat that they include substantially all of the $3,574,439.65 referred to in Finding No. 40, except items aggregating approximately $500,000.00. We do not discuss these latter items, but will do so in the event this Petition for Certiorari is granted, as we contend many of them were made pursuant to treaty obligations and were not proper offsets. The Secretary of the Interior, in his report to the general accounting office, in this case, with reference to these expenditures, said:

> "The General Accounting Office reported on page 595 that there had been expended from funds of the United States for administrative purposes for the Five Civilized Tribes the sum of $8,286,254.08 from 1894 to 1929. The purposes of these expenses appear to have been to carry out stipulations and agreements and to negotiate new ones."

In all of the treaties with this Tribe from the *Treaty of October* 18, 1820 (7 Stat. 210) to the Atoka Agreement the Government has stipulated to furnish an agent in the Indian country at the Government's expense. Article 6 of the Treaty of 1820 reads:

> "The Commissioners of the United States further covenant and agree on the part of the United States

that an agent shall be appointed in due time for the benefit of the Choctaw Indians who may be permanently settled in the country ceded to them beyond the Mississippi River."

Article 9 of the Treaty of 1825 (7 Stat. 234) provided:

"* * * An agent shall be appointed for the Choctaws west of the Mississippi."

Article 12 of the Treaty of 1830 (7 Stat. 333) provided:

"All intruders shall be removed from the Choctaw Nation and kept without it."

Article 13 of the same treaty provides:

"It is consented that a qualified agent shall be appointed for the Choctaws every four years unless sooner removed by the President; and he shall be removed on petition of the constituted authorities of the Nation, the President being satisfied there is sufficient cause shown. The Agent shall fix his residence convenient to the great body of the people; and in the selection of an Agent immediately after the ratification of this Treaty, the wishes of the Choctaw Nation on the subject shall be entitled to great respect."

The treaty of 1855 (11 Stat. 611) reads:

"* * * and in order that their relations to each other and the United States may hereafter be considered in a harmonious and satisfactory manner, there shall be one agent for the two tribes."

The treaty of April 28, 1866 (14 Stat. 769), Article 10, reads:

"The United States re-affirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw Nations, entered into prior to the late rebellion, and in force at that time, not inconsistent herewith; and further agrees to

renew the payment of all annuities and others moneys accruing under such treaty stipulations and acts of legislation, from and after the close of the fiscal year ending on the thirtieth of June, in the year eighteen hundred and sixty-six."

We submit that the Court of Claims has overlooked or failed to give due weight to the provisions of these former treaties. In *Choctaw Nation* v. *United States,* 119 U. S. 1, in speaking of the obligations of the Government under the treaty of 1830, this Court said:

> "It is perhaps, impossible to interpret the language of this instrument, considered as a contract between parties standing upon an equal footing and dealing at arm's length, as a conveyance of the legal title by the Choctaw Nation to the United States, to hold as trustee for the pecuniary benefit of the Choctaw people; and yet it is quite apparent that the only consideration for the transfer of the lands that can be considered as inuring to them is the general advantage which they may be supposed to have derived from the faithful execution of the Treaty on the part of the United States; and when in that connection it is considered that the treaty was not executed on the part of the United States according to its just intent and spirit, with a view to securing to the Choctaw people the very advantages which they had a right to expect would accrue to them under it, it would seem as though they had lost their lands without receiving the promised equivalent."

XI.

This case is one of public interest, in that it involves the differences that have existed between the Choctaw Nation and the United States Government of many years standing. An injustice will be done to some 26,000 members of the Choctaw Tribe of Indians, now residents of the State of Oklahoma, as we believe, by the judgment rendered in this

case. Their rights to have an accounting on matters adjudicated by the Court of Claims being their last opportunity to ask for relief, the case becomes of importance to more than 26,000 persons, residents of the State of Oklahoma.

XII.

The ruling of the Court of Claims in this case affects not only the Choctaw Nation, but the four other Nations constituting the Five Civilized Tribes, namely: The Cherokees, Chickasaws, Creeks and Seminoles, in whose behalf similar cases are now pending in the Court of Claims. This being the first ruling by the Court of Claims on the various treaties dealing with the breaking up of the tribal domain and the general subject of gratuities as applied to these Tribes, the decision of this Court will be of importance to the entire Five Civilized Tribes, whose aggregate enrollment is approximately 100,000 persons, residing in the State of Oklahoma, in that part of the State formerly constituting the Indian Territory.

Relief.

The petitioner, the Choctaw Nation, respectfully prays that a Writ of Certiorari issue to the Court of Claims to the end that all matters involved may be reviewed by this Court, and that the petitioner be granted such other and further relief as may be just and proper.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 659

THE CHOCTAW NATION, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 62–107) is not reported.

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered April 1, 1940 (R. 108). Motions for a new trial were denied October 7, 1940 (R. 108). The petition for a writ of certiorari was filed December 30, 1940. The jurisdiction of this Court is invoked under Section 4 of the Act of May 20, 1924, c. 161, 43 Stat. 133, as amended

by the Joint Resolution of May 19, 1926, c. 341, 44 Stat. 568, and the Act of February 19, 1929, c. 268, 45 Stat. 1229.

QUESTIONS PRESENTED

Petitioner brought this suit under the Act of June 7, 1924, empowering the Court of Claims to determine claims asserted by petitioner against the United States under treaties and Acts of Congress. The court held that the United States was liable to petitioner for $63,423.11; that the United States was entitled to offsets of $3,574,439.65; and accordingly that the petition should be dismissed. Petitioner's specific contentions are indicated in the Argument, below.

STATEMENT

A comprehensible statement of each of the many accounting details which underlie the decision below would expand this brief in opposition to a point which would defeat its purpose. It is believed that the nature of the questions presented by petitioner can be determined without a detailed understanding of the factual circumstances, or of all of the relevant statutes and treaties. These are extensively discussed in the findings (R. 30–62) and the opinion (R. 62–107) of the court below. The Argument, below, indicates the relevant treaties and statutes, and summarizes the accounting details with particularity sufficient to show the nature of the questions presented by petitioner.

ARGUMENT

1. Petitioner asserts (Pet. pp. 13–16) that it should recover $789,773.17. The 20 items going to make up this amount are set forth in the opinion below (R. 71) and the court's findings in respect of them are at R. 32–42. Petitioner relies upon the provision of the Atoka agreement, ratified by section 29 of the Act of June 28, 1898, c. 517, 30 Stat. 495, 509:

> That no charge or claim shall be made against the Choctaw and Chickasaw tribes by the United States for the expenses of surveying and platting the lands and town sites, or for grading, appraising and allotting the lands, or for appraising and disposing of the town lots, as herein provided.

The court below correctly held (R. 72–75, 88–89) that this provision comprehended expenses incurred in respect of town lots sold under authority of the Atoka agreement[1] and pointed out (R. 72–73) that the United States had borne these expenses. Petitioner's suggestion (Pet. pp. 13–14)

[1] Petitioner does not, and could not, assert that any of the items related to expenditures incurred under the Atoka agreement. For example, the sale of unallotted lands (item 1) and of segregated coal and asphalt lands (item 2) was authorized by the supplemental agreement ratified by the Act of July 1, 1902, c. 1362, 32 Stat. 641, 642, 653. The twentieth item "Expenses of sale of town lots" relates, as the tabulation shows (R. 71), to sales under the Act of May 29, 1908, c. 216, 35 Stat. 444, 445, and not to sales under the Atoka agreement (R. 87–89). No other item bears even a superficial relationship to the obligation of the Atoka agreement.

that it would be permissible to construe the provision as a broad undertaking to bear all the remotely related or wholly separate expenditures included in this claim, even if tenable, obviously does not show that, in rejecting such an expanded construction, the court erred.

2. Petitioner contends (Pet. p. 16) that it is entitled to recover $119,294.25 spent from tribal funds for educational purposes in excess of appropriations (R. 34–37). The expenditures were made solely for petitioner's benefit (R. 37) to pay expenses which the United States was not obligated to bear (R. 77). The court below took the view (R. 76–78) that, since the disbursements were for expenses of this character, a judgment for their amount would result in a gratuitous expenditure by the United States for the benefit of the petitioner, within the meaning of Section 2 of the Act of August 12, 1935, c. 508, 49 Stat. 571, 596. It held (R. 77 that Section 2 was a "ratification of the disbursements made by the Secretary of the Interior from tribal funds for proper purposes and for the benefit of the tribe which may have been in excess of congressional appropriation." Accordingly, the court concluded that the United States was not liable.

Section 2 directs the Court of Claims to offset against any amount found due an Indian tribe all sums expended gratuitously by the United States for the benefit of the tribe but provides that funds

appropriated and expended from tribal funds shall not be construed as gratuities. On its face, the Act relates to offsets, and hence the court's holding went beyond its literal meaning.

However doubtful this construction might at first seem, nothing advanced by petitioner tends to show that it is erroneous. Apparently, petitioner argues that expenditures from tribal funds may not be offset against a liability of the United States to petitioner. But, as the court's findings in respect of gratuities to be offset make plain (R. 54–62), the court did not offset against the Government's liability to petitioner any "funds appropriated and expended from tribal funds" or sums which, like the $119,294.25 here claimed, were expended from tribal funds in excess of authorized appropriations. Therefore, that part of Section 2 invoked was given precisely the effect urged by petitioner. It does not follow, because such expenditures are unavailable as an offset, that the United States should be required to restore to tribal funds amounts disbursed for petitioner's benefit to meet expenses which admittedly the United States never assumed. Petitioner, therefore, does not show that the court below erred in holding that, by reason of the Act of August 12, 1935, the United States was not liable.

3. There is no warrant for petitioner's contention (Pet. pp. 16–17) that it is entitled to $147,491.36 more than it was awarded by the judgment

in *United States* v. *Choctaw Nation,* 38 C. Cls. 558 (1903). As the court below held (R. 94) its jurisdiction under the Act of June 7, 1924, pursuant to which this suit was brought, extends only to claims which "have not heretofore been determined and adjudicated on their merits." Petitioner does not contend that the court erred in the determination of its jurisdiction.

4. Petitioner urges (Pet. pp. 17–18) that $419,580.19, paid by the Secretary of the Interior to the Choctaw National Treasurer (R. 44–46), was disbursed in violation of Section 19 of the Act of June 28, 1898, the Curtis Act, 30 Stat. 495, 502. The Court of Claims rightly held (R. 95) that Section 19 related only to funds which were to be distributed to individuals of the tribe and that the sums in question were not so distributable. *Seminole Nation* v. *United States,* decided January 6, 1941.[2]

5. Petitioner asserts (Pet. pp. 18–19) that the Secretary of the Interior disbursed from trust

[2] Even if the Curtis Act had been violated, petitioner would not be entitled to recover the payments made to the tribal treasurer. In *Seminole Nation* v. *United States*, decided January 6, 1941, the Court of Claims held:

"But although the Curtis Act did prohibit the making of these per capita payments to the tribal treasurer, and they were so made in violation of its terms, still we do not think the tribe is entitled to recover. The passage of the Curtis Act did not create in the individual Indians any vested rights. It does not amount to an agreement with the tribe for the benefit of its individual members. It was merely a direction to the agents of the United States."

funds of the tribe $978,787.31 without authority of law. After a detailed examination (R. 97–101) of the various statutes under which the Secretary acted, the Court of Claims concluded (R. 101) that the payments were made "pursuant to authority and direction of Congress that they be paid 'out of any moneys' of the tribe, or 'the funds' of the tribe, or 'out of any funds' of the tribe, or 'from the tribal funds' of the tribe." Petitioner's contention that these authorizations are to be read so narrowly that they would not extend to *trust* funds is unsupported by authority and unwarranted.[3] It follows, of course, that its claim (Pet. p. 20) for $1,233,907.40 as interest upon the $978,787.31 is likewise baseless.

6. Petitioner asserts (Pet. pp. 20–21) that it is entitled to recover $286,142.18 under article 3 of the treaty concluded April 28, 1866, between the United States and the Choctaws and Chickasaws. 14 Stat. 769. By article 3 the United States agreed to pay petitioner $225,000 as its share of $300,000, the purchase price of lands ceded by the Choctaws and Chickasaws. Despite petitioner's contrary assertion (Pet. p. 20) the agreed amount, together with $7,125 on account of interest for the two years

[3] The language from the opinion of then Assistant Attorney General Van Devanter, quoted in *Seminole Nation* v. *United States*, 82 C. Cls. 135, 157–158, expressed the view that Section 19 of the Curtis Act governed disbursement of Seminole funds and did not, as petitioner intimates (p. 19), construe statutes relating to payments from Indian funds.

following ratification of the treaty, was long since paid (R. 32, 70). However, an analysis of the petition in the court below discloses (R. 2–4) that the claim for $286,142.18 is based upon an assumption that petitioner should have additional *interest* of $79,082.87 and also interest of $206,059.31 upon the $79,082.87. The petition suggests no reason for this claim, and there is none.

7. In sole support of its assertion (Pet. pp. 21–24) that the court erred in finding (R. 54–62) that $3,574,439.65 was gratuitously spent by the United States for the benefit of petitioner, the latter cites (Pet. pp. 22–24) treaty provisions by which the United States agreed to furnish it with an agent. Plainly, without any showing that the expenditures were covered by these treaty provisions, these citations do not tend to show that the Court of Claims erroneously concluded that the moneys in question were expended by the United States without any obligation under any treaty or agreement.

CONCLUSION

The decision of the Court of Claims is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

FEBRUARY 1941.

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